International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Local 72, AFL-CIO (Combustion Engineering, Inc.) *and* **Wolfgang Hoffman.** Case 36-CB-821

February 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed by Wolfgang Hoffman, an individual, on February 15, 1979, and duly served on International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Local 72, AFL-CIO (herein called Respondent or the Union), the General Counsel of the National Labor Relations Board, acting through the Regional Director for Region 19, issued and served on Respondent a complaint and notice of hearing and an amended complaint alleging that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended. Respondent answered both the complaint and the amended complaint and on July 14, 1980, Respondent, Hoffman, and the General Counsel filed with the Board a stipulation of facts. The parties stipulated to the contents of the record and agreed that no oral testimony was necessary or desired. They further stipulated that they waived a hearing before an administrative law judge, the makings of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision, and desired to submit this case for findings of fact, conclusions of law, and an order directly to the Board. By order dated September 11, 1980, the Board approved the stipulation of facts and transferred the proceeding to the Board. Thereafter, briefs were filed by the General Counsel and Respondent.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record stipulated by the parties, and the briefs filed by the parties, and hereby makes the following findings and conclusions.

I. THE BUSINESS OF THE EMPLOYER

Combustion Engineering, Inc., is a Delaware corporation authorized to do business in the State of Oregon with an office and place of business located in Portland. At all times material to this proceeding, it has been engaged in the construction and renovation of boilers and other devices used in the generation of electrical power by electric utilities and other companies, including such a construction project located at Boardman, Oregon, which is the only site involved in this proceeding. During the past 12 months, which period is representative of all times material herein, Combustion Engineering purchased and caused to be transferred and delivered to its facilities within the State of Oregon goods and materials valued in excess of $50,000 directly from sources outside said State. On the basis of the above facts, the parties stipulated, and we find, that Combustion Engineering is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated and we find that Respondent Union is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

Respondent and Combustion Engineering have maintained and enforced at all times material to this proceeding a collective-bargaining agreement entitled the Nine Western States Boilermaker Field Agreement (Field Agreement) with effective dates of October 1, 1978, to September 30, 1980. This collective-bargaining agreement incorporates by reference the Nine Western States Joint Referral and Rules Procedure (Referral Rules). According to the Field Agreement and the Referral Rules, Respondent has the exclusive right to refer employees to the Employer for positions covered by the bargaining unit.

The Referral Rules, which are part of the collective-bargaining agreement, contain a dispute procedure described in article 4 therein which provides in pertinent part:

> *Section 4.2—Dispute Bond—Forfeiture or Refund*—Grievants must deposit a good-faith cash bond in the amount of $50.00, which may be forfeited in the event the Dispute Committee finds against the grievant, in which event the cash bond will be used to defray in whole, or in part the expenses incurred in processing the grievant's case. The bond will be returned to the grievant if the Dispute Committee finds in favor of the grievant.[1]

[1] Since 1959, and continuously thereafter until the implementation in 1979 of the provision set forth above, the predecessor agreements to the current collective-bargaining agreement and the Referral Rules had required the deposit of a $10 good-faith cash bond in circumstances identical to those in which the $50 bond is currently required.

Hoffman, a member of Respondent, was referred by Respondent to work for Combustion Engineering at its Boardman project sometime in January 1979.

On or about February 7, 1979,[2] Hoffman was discharged by Combustion Engineering. The lawfulness of this discharge is not an issue in this proceeding. On or about February 9 Hoffman went to Respondent's facility in Portland, Oregon, for the purpose of signing the out-of-work list and obtaining a referral. Respondent's assistant business manager, Fred Mosely, informed him that under the Union's Referral Rules he could not, because of his discharge, be referred to another job for a period of 15 days. Mosely showed Hoffman a copy of his discharge letter which Respondent had received from Combustion, but refused either to give him a copy of the letter or to allow him to copy the letter by hand. Mosely then told Hoffman that, if he wanted to file a grievance about his discharge, he would first have to pay the Respondent $50 and he explained that this requirement had become effective on January 1, 1979. Mosely further stated that, if Hoffman won the grievance, the $50 would be refunded to him. Mosely added that Hoffman had 7 days in which to file a grievance if he so desired and that, once a grievance was filed, it took about 15 days for the grievance to reach the dispute committee. The parties stipulated that at no time did Mosely discuss with Hoffman the merits of his possible grievance, or advise him whether he should file a grievance.

Hoffman delivered a handwritten grievance concerning his discharge and a check for $50 to Mosely at Respondent's facility on February 12. Mosely accepted both the grievance and the check, although he refused to give Hoffman a receipt for the check. On June 21, 4 months after Hoffman filed the unfair labor practice charge which is the subject of this proceeding, Respondent sent Hoffman a check for $50 without explanation, and informed him that his grievance was being processed according to the Nine Western States Field Grievance procedure. At the time of the stipulation, Hoffman had received no further communications from Respondent concerning the status of his grievance.

B. *The Issues and Contentions*

The General Counsel alleges that Respondent violated its duty of fair representation under Section 8(b)(1)(A) of the Act by requiring Hoffman to pay a $50 dispute bond before it would discuss or assess informally with him the merits of his grievance. The General Counsel also argues that the $50 dispute bond on its face can be characterized only as an arbitrary and unreasonably costly restriction of access to the grievance procedure. He further claims that the bond forces potential grievants to "gamble" on the validity of their grievance, since they must decide independently, without any prior consultation with their bargaining representative, whether their grievance has merit. If they are right and their grievance is meritorious then the bond is refunded. If they are wrong, they have forfeited $50 without deriving a benefit.

Respondent argues that the dispute bond has been negotiated in good faith between Respondent and the employer association and, as such, it is neither arbitrary nor unreasonable. The amount is not excessive since it is equal to a little less than 4 hours of pay for the lowest paid employee under the contract. It is not arbitrary since its purpose is to weed out nonmeritorious appeals which would otherwise burden the Local Joint Referral Dispute Committee which is responsible for reviewing grievances arising out of problems with job referrals. Respondent recognizes that Business Manager Mosely advised Hoffman to grieve under the wrong contractual provision, but points out that it refunded the bond to Hoffman, and told him his grievance would be considered under the other procedure once it realized the error.

C. *Discussion and Conclusions*

We have concluded that Respondent violated Section 8(b)(1)(A) by failing or refusing to discuss or to assess informally the merits of Hoffman's grievance with him until he paid the $50 dispute bond. Because of this holding, we do not reach the broader issue of whether Respondent's establishment of the $50 dispute bond would, under any circumstance, constitute a *per se* violation of Section 8(b)(1)(A).

It is well established that "[i]n administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." *Vaca* v. *Sipes*, 386 U.S. 171, 194 (1967). This is because the "grievance procedure is vital to collective bargaining and . . . grievance representation is due employees as a matter of right." *International Association of Machinists and Aerospace Workers, Local Union No. 697, AFL-CIO (The H. O. Canfield Rubber Company of Virginia, Inc.)*, 223 NLRB 832, 835 (1976); *Teamsters Local 559, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Mashkin Freight Lines, Inc.)*, 243 NLRB 848 (1979).

[2] All dates hereinafter refer to 1979 unless otherwise noted.

In the instant case Respondent's business agent, Mosely, refused to discuss or even to assess Hoffman's grievance with him informally until Hoffman posted the $50 dispute bond. He further restricted Hoffman's ability to assess intelligently the merits of his grievance by refusing to permit him to copy Combustion Engineering's letter to the Union stating its reason for discharging Hoffman. He merely informed Hoffman that under the contract he could not be referred for 15 days following his discharge, and that if he wished to protest this action he would have to post a $50 dispute bond in order for any grievance to be considered. Thus, several months after Hoffman filed a grievance and posted the dispute bond, and 4 months after he filed the unfair labor practice charge which is the basis of this proceeding, Respondent belatedly refunded the bond and informed Hoffman that it would process his grievance under the general contractual procedure.[3]

Based on the above facts, we find that Respondent processed Hoffman's grievance in an arbitrary and perfunctory manner, in violation of Section 8(b)(1)(A) by refusing to discuss the grievance preliminarily with Hoffman before demanding a fee. By refusing to discuss or appraise the grievance with him until he paid the dispute bond, Respondent has deprived one of the unit members of his grievance representation which belongs to him as a matter of right. This case highlights the pitfalls of the procedure: Hoffman's was not a referral grievance, a fact counseling should have brought out.

Respondent, however, argues that the fee is designed to discourage frivolous grievances so that the grievance system is not overburdened. While this goal may be legitimate, the means used here to achieve it are not since Respondent has withheld even a preliminary assessment of the grievance until it receives the bond. We therefore find that Respondent has, by the above actions, violated Section 8(b)(1)(A) of the Act.[4]

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, we shall order it to cease and desist therefrom and to take certain affirmative action to effectuate the purposes of the Act. Specifically, we shall order Respondent to cease and desist from refusing to counsel or advise employees preliminarily about the merits of their grievances until they have posted bond.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, we make the following:

CONCLUSIONS OF LAW

1. Respondent Union is a labor organization within the meaning of Section 2(6) and (7) of the Act.

2. By refusing to discuss or to counsel Wolfgang Hoffman about his grievance until he paid a $50 dispute bond, Respondent has violated Section 8(b)(1)(A) of the Act.

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Local 72, AFL-CIO, Portland, Oregon, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to counsel or advise employees preliminarily about the merits of their grievances until they have posted a bond.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Post at its business offices and meeting halls and at all places where notices to its members and other employees in the bargaining unit are customarily posted (including all such places at Combustion Engineering, Inc.) copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by the Union's representative, shall be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this

[3] As noted earlier, if Hoffman had been required to process his grievance under the referral procedure his bond would have been refunded only if Respondent had found merit to the grievance.

[4] The dissent argues that the bonding procedure is a product of collective bargaining. But the bonding as such is not found unlawful and the culpability of employers which have no duty to represent employees fairly or otherwise cannot exculpate a union which does.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the Natioanl Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Order, what steps have been taken to comply herewith.

MEMBER JENKINS, dissenting:

Contrary to my colleagues, I would find that Respondent Union did not violate Section 8(b)(1)(A) of the Act when it required Charging Party Hoffman to post a $50 bond for processing of his grievance and declined to counsel him about his grievance until he had done so. Accordingly, I would dismiss the complaint it its entirety.

Most of the basic facts are set out in the majority opinion and I will not exhaustively review them. However, although the majority makes scant mention of the fact, it is significant that the grievance procedure at issue here is the product of collective bargaining between Respondent Union and employers signatory to the Nine Western States Boilermakers Field Agreement and has been in existence in basically the same form for over 20 years.

Because of this extensive bargaining history, some background is useful in evaluating the propriety of the current grievance procedure. The 1959 agreement established both a National Joint Rules and Standards Committee, composed of three employer and three union representatives, and a Joint Referral Committee for each local. Since 1959, the national committee has, through collective bargaining, formulated and implemented uniform minimum standards to govern the process of referrals for all Boilermakers-affiliated construction locals. (Respondent points out that the employers sought the referral rules as a *quid pro quo* for permitting the Union to operate an exclusive hiring hall.) Under the successive agreements since 1959, these minimum standards have been used by the local committees which then promulgate their own rules and regulations for referral. The local rules must be consistent with the minimum standards established by the national committee.

From 1959 until 1979, the model rules contained a review procedure whereby any applicant for referral had the right to "appeal any dispute or grievance arising out of and relating to the operations of the referral plan," so long as the applicant paid a cash bond of $10. If his appeal was successful, the bond was refunded. If unsuccessful, the bond would be used to pay any expenses incurred in the appeal.

Under the current contract, as before, the local committees "hear and decide any and all disputes or grievances arising out of the operation of the job referral system including, but not limited to grievances arising out of work registration, work referrals, and the preparation of the referral registration lists." Article 4 of the Joint Referral and Rules Procedures—which my colleagues have found to be unlawful—sets forth the procedure for disputes arising out of the operation of the referral rules:[6]

> *Section 4.2—Dispute Bond—Forfeiture or Refund*—Grievants must deposit a good-faith cash bond in the amount of $50.00, which may be forfeited in the event the Disputes Committee finds against the grievant, in which event the cash bond will be used to defray in whole or in part the expenses incurred in processing the grievant's case. The bond will be returned to the grievant if the Disputes Committee finds in favor of the grievant.

Of course, article 4 is not the only grievance procedure in the agreement. The parties' agreement also contains grievance machinery for the processing of "grievances that may arise on any job covered by [the collective-bargaining agreement] . . . ." There is no bond requirement under this procedure.

From this history, two important points emerge. First, the majority's decision interferes with the parties' well-established and stable collective-bargaining relationship by undermining their negotiated *quid pro quo* for the exclusive hiring hall arrangement. It does so by substituting its own version of the grievance procedure for that bargained for by the parties. That is, under the majority's rationale, the Union, in order to retain the bond requirement, must now engage in some sort of ill-defined pregrievance counseling. This requirement was never negotiated by the parties; it has been unilaterally imposed by my colleagues.

Yet that result—the imposed revision of the bargained-for grievance procedure—is not compelled by Section 8(b)(1)(A) of the Act, for the procedure here is not in any sense arbitrary. See, generally, *Vaca* v. *Sipes*, 386 U.S. 171, 193–195 (1967). To the contrary, it is directly related to the orderly management of the hiring hall. Indeed, the Board has permitted unions to charge reasonable fees to nonmembers for use of an exclusive hiring hall. See, for example, *Local 825, International Union of Operating Engineers, AFL-CIO (H. John Homan Company)*, 137 NLRB 1043 (1962). The imposition of a modest filing fee in order to reduce some of the expenses incurred in processing a grievance concerning the operation of a hiring hall and to eliminate some frivolous filings seems no less reasonable than the imposition of a reasonable fee to use the hall in the first place, and this is particularly true where,

[6] In fact, the parties stipulated that, since 1959 and continuously thereafter until the implementation in 1979 of art. 4, the referral rules have required the deposit of a $10 good-faith cash bond in circumstances identical to those in which the bond is currently required.

as here, all grievances automatically receive formal consideration by the local referral committee. Certainly, the committee has a legitimate right to establish a screening device so that the review system will not be overwhelmed by frivolous grievances. Moreover, the use of the dispute bond seems particularly justified since it applies only to grievances arising out of the referral rules for Respondent's exclusive hiring hall. For all other grievances—that is, the majority of grievances—there is a separate grievance procedure for which no bond is required.

Thus, this case does not fit into the typical pattern of a duty of fair representation case: For example, one where a union representative fails to act fairly or in good faith or displays outright hostility to a unit member in processing his grievance. See, e.g., *Warehouse Union, Local 860, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (The Emporium)*, 236 NLRB 844 (1978); *ITT Arctic Services, Inc.*, 238 NLRB 116 (1978). To the contrary, Respondent here acted in good faith, and followed the established grievance procedure. When, in processing Hoffman's grievance, it realized that Hoffman was concerned with his underlying discharge, and not the refusal to refer *per se*, it returned the dispute bond to Hoffman, and began processing the grievance. Under these circumstances, I do not see how a violation of Section 8(b)(1)(A) has been established. I therefore dissent.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board having found, after a hearing, that we violated the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT refuse to counsel or advise employees preliminarily about the merits of their grievances until they have posted a bond.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, LOCAL 72, AFL-CIO